

ORIGINAL

DEPT. OF TRANSPORTATION
DOCKETS

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

2003 MAR 19 P 4:31

In the Matter of the

CITIZENSHIP OF DHL AIRWAYS, INC.

Docket OST-2002-13089 - 36

COMMENTS OF DHL AIRWAYS

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March 19, 2003

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PRELIMINARY MATTERS

Last August, DHL Airways, Inc. ("Airways") suffered a major loss, the untimely and sudden death of Joseph R. O'Gorman, its Chairman, President, and Chief Executive Officer. During his eighteen months as Airways' senior executive, Mr. O'Gorman acted decisively to transform the company into an "air only" ACMI and charter operator. In doing so, Mr. O'Gorman replaced all of the company's officers and substantially all of the director-level employees with seasoned airline veterans (none of whom had prior experience with DHL Airways or its affiliates), stabilized operations and performance, negotiated an ACMI agreement with its principal customer that provided financial stability and a platform to grow its customer base, established a separate corporate headquarters, created *de novo* administrative functions (with large systems-related capital expenditures) in areas such as finance, legal, IT, charter marketing, and human resources, retired a fleet type and introduced 14 airplanes. Above all he restored the company from an

integrated small package shipping company to an independent vendor and service provider for the DHL Worldwide Express network and other customers.

Filling the shoes of the highly regarded Mr. O’Gorman was no easy task for the Company’s Board of Directors. While the Board conducted an exhaustive search for its top executive, two of Mr. O’Gorman’s long-time deputies who were managing the company on an interim basis, were able to sustain his vision of independence and growth. For example, during this period the company established an operation in Germany to supplement the United States Air Force’s operations within Europe and to the Middle East and the airline committed significant resources to additional charter business.

The Airways Board’s determination to find the most outstanding available chief executive was fulfilled yesterday with the announcement that after a seven-month search the Board had selected John H. Dasburg to be Airways’ new Chairman and CEO, effective April 1, 2003. A copy of Airways’ press release and a copy of Mr. Dasburg’s letter to the Assistant Secretary for Aviation and International Affairs officially notifying the Department of his appointment were filed in this Docket at the time of the announcement.

John Dasburg needs no introduction to the Department or to the domestic airline industry. For over ten years, prior to his present position as Chairman of Burger King Corporation, he led Northwest Airlines as its President and Chief Executive Officer through one of the most tumultuous decades in the history of civil aviation. Under his stewardship, Northwest expanded its passenger operations domestically, in Europe and in Asia, grew its cargo business, moved Northwest into

the new McNamara Terminal at Northwest's Detroit hub, and pioneered the antitrust immunity alliance model with KLM. At the time of his departure from Northwest in February 2001, Mr. Dasburg was the longest tenured CEO of any of the large network airlines.

The appointment of Mr. Dasburg comes at an important time in the history of Airways and fills a void at the highest levels of the company with, in the words of acting Chairman Roy Moulton, "a superb leader with strong ethical standards." In addition, the Navy veteran will have a significant personal stake in the success of the enterprise as he will initially have a 5% equity position in the carrier.

Mr. Dasburg's *bona fides* should be beyond attack (even from the tiresome complaints of the two largest domestic cargo airlines) and his return to the airline industry is a significant development.

BACKGROUND

On March 4, 2003, the Department's Inspector General (the "IG") issued a letter responding to a request from Representative Don Young, Chairman of the House Transportation and Infrastructure Committee, that the IG examine the Department's procedures for reviewing the citizenship of air carriers following a substantial change in ownership, management or operations, with a particular focus on the Department's review of the citizenship of Airways.¹

¹ Letter from Inspector General Kenneth M. Mead to Representative Don Young dated Mar. 4, 2003, at 5 ("IG Letter").

In that review, the Department concluded that Airways continues to be a U.S. citizen,² in accordance with the applicable statutory requirements and the Department's policies and precedents. The IG acknowledges that the informal process used to review Airways' citizenship was consistent with Department precedent and in no way unusual. To the contrary, the IG noted, "the Department typically uses an informal proceeding based on 14 C.F.R. § 204.5" to conduct such reviews.³ Nor does the IG question the finding that Airways currently meets the statutory requirements governing corporate citizenship, as to which "[t]here is little or no dispute."⁴

In the IG's view, however, the informal "fitness review" process is not well suited to a case involving "matters that are complex or that have become contentious and controversial" -- as the IG believed was true of the Airways' citizenship question.⁵ Thus, for the future, the IG recommended that the Department modify its procedures, to use a more formal process when considering what it describes as "complex" or "contentious" cases. At the same time, the IG called for further consideration of certain "control" issues relating to Airways' citizenship -- issues that have already thoroughly been reviewed by the Department -- in the formal context of the pending docket. The IG emphasizes that his comments "should not be interpreted to presuppose a particular outcome," noting

² Letter from Donald Horn, Assistant General Counsel for International Law, to DHL Airways dated May 1, 2002.

³ IG Letter, at 1.

⁴ *Id.* at 6.

⁵ *Id.* at 4.

that “[i]t is the Department’s role to decide these matters and we defer entirely to the Department in that regard.”⁶

Immediately after the IG's letter to Chairman Young was released, the Department by Notice dated March 5, 2003 requested comments on the IG’s letter as it relates to issues pending in this docket. In response to that request, Airways submits the following comments:

COMMENTS

1. As a preliminary matter, Airways strongly disagrees with the IG’s view that the Department’s informal continuing fitness review procedures are not well suited to evaluate Airways’ citizenship. These procedures, which the Department has used as a matter of longstanding policy and practice, are well tailored to evaluate citizenship questions such as those presented by the Airways reorganization. The Department’s reasoning has best been articulated by Secretary Mineta in a letter on the same subject to then Chairman Ernest F. Hollings of the Senate Commerce, Science and Transportation Committee, dated September 25, 2003 (“Mineta letter”).

In the case of Airways, the Department’s investigation was thorough -- involving meetings with the staff by Airways’ officers and directors, and with counsel; a careful review of documents concerning the proposed corporate changes; and an evaluation by the Department of the full range of corporate relationships between Airways and its minority, foreign shareholder. On the basis

⁶ *Id.* at 2.

of that investigation, which was fully consistent with Department precedent, the Department correctly determined that Airways continues to be a citizen, meeting the three applicable statutory requirements as well as the Department's "actual control" test. Moreover, all of the matters the IG raises in his letter have already been addressed by Airways for the Department's benefit in numerous pleadings previously filed in this and related dockets, which are incorporated herein by reference.

2. Throughout this two year process, Airways' two largest competitors, United Parcel Service Co. ("UPS") and Federal Express Corporation ("Federal Express"), have filed complaint after complaint in at least five different dockets, alleging that Airways is under the control of foreign entities -- principally its major customer, DHL Worldwide Express (the ground company that performs pickup and delivery services for the DHL network), and the parent of Worldwide Express, Deutsche Post (a public company that operates the German postal delivery entity and is the corporate parent of DHL International). In pleading after pleading, UPS and Federal Express have urged that the Department institute more formal proceedings to assess Airways' citizenship -- in a seemingly unending attempt to undermine the Department's traditional procedures and force it to institute a public proceeding.

If adopted, such public proceeding would allow UPS and Federal Express the opportunity to scrutinize the sensitive confidential corporate documents of Airways, a major competitor, cross-examine Airways' officers, directors and executives, engage in extensive discovery, and otherwise deflect Airways and its management

from the business of operating an airline. On the contrary, as the Mineta letter aptly notes, “the use of traditional procedures affords the Department the most effective and acceptable way to ensure compliance with the law without unfairly disrupting the operations of the airline under review or providing competitors with unfair access to internal corporate materials that would otherwise be unavailable.”

It should come as no surprise that UPS and Federal Express -- seeking to perpetuate their duopoly position -- take exception to the Department’s determination. But endless and duplicative filings, pleadings and complaints do not make the case “complex, contentious [or] controversial,”⁷ so as somehow to render the Department’s traditional informal review procedures inappropriate. There is no reason for the Department to conduct a new investigation or revisit -- based upon allegations by disgruntled competitors -- a determination made after exhaustively considering the relevant issues in a normal way.

3. The Department’s consistent experience over many years demonstrates that a flexible, non-public, informal process is the most effective way for the Department to investigate and determine the continuing fitness (which necessarily includes the citizenship) of certificated air carriers.⁸ Informal, non-adversarial proceedings promote open discussions between Department staff and carriers and encourage carriers to be forthcoming in sharing confidential business plans to facilitate the Department’s review.⁹ As the Department recognizes,

⁷ IG Letter, at 4.

⁸ Mineta letter, at 1.

⁹ *Id.*

carriers would be much more reluctant to disclose such sensitive, proprietary information if they were required to do so in a public, adversarial proceeding where their competitors would have access to such information.¹⁰ In sum, the Department's informal procedures enable a more efficient and comprehensive review while safeguarding the business confidentiality and due process rights of the carrier under review. The use of formal procedures recommended by the IG would disrupt a process which has served the Department and the industry well.

4. The IG's recommended approach would sacrifice these advantages of the informal review process whenever a carrier's competitors assert that the matter is "contentious" or "controversial." Needless to say, it would be in the self-interest of these competitors to characterize the matter in those terms. Not only would this allow them to protract the review process (by requiring the carrier to respond to competitors' allegations), but it also would provide them access to the carrier's confidential business information. Virtually all cases of citizenship review would turn into formal, protracted adversarial proceedings. The IG fails to come to grips with this danger.¹¹

5. As noted above, the IG expressly recognizes that Airways complies with the three statutory prerequisites for citizenship.¹² Instead, the IG's inquiry focuses on the Department's policy requiring that carriers be under the actual

¹⁰ *Id.*

¹¹ The Department's experience has led it to apply entirely different criteria for deciding when it may be appropriate to establish a formal public proceeding for continuing fitness review purposes. *See* Mineta letter, at 3 (the Department initiates "public action where necessary, such as when there is an impasse. For example, where a carrier undergoing review has been uncooperative, . . . the Department issues a public order or opens a public investigation.").

control of U.S. citizens. The IG identifies seven “commonly cited factors used to determine actual control,”¹² three of which, as the IG recognizes, have no relevance whatsoever to this case.¹⁴ The IG then focuses on the remaining four “factors bearing on actual control.” These, the IG says, “appear to be in dispute,”¹⁵ a conclusion that is based on the petitions and complaints of UPS and Federal Express rather than the carefully crafted conclusions of the Department. As shown in the multitude of responses Airways has already filed -- and as discussed below -- none of these factors suggest that Airways is actually controlled by non-U.S. citizens. The only conclusion that can be drawn from the complaints of UPS and Federal Express (and the IG letter) is that the Department should definitively reject the misstatements of facts and law in an Order dismissing the Complaints.¹⁶ Airways will address each of the four factors referenced by the IG.

a. Equity Ownership. The IG acknowledges that Airways’ ownership complies with the citizenship requirements of the statute. There is no question that U.S. citizens always have held 75% of the voting interest of Airways. Nonetheless, the IG questions whether at some point prior to completing its restructuring, Airways’ ownership may have been inconsistent with what is

¹² IG Letter, at 2, 5-6.

¹³ *Id.* at 6.

¹⁴ These three factors are control via super-majority or disproportionate voting rights, negative control/power to veto, and buy-out clauses. *See id.* at 8.

¹⁵ *Id.* at 7.

¹⁶ Indeed, Airways agrees with of the IG's recommendation that the Department issue an order detailing the reasons for its conclusion that Airways is a U.S. citizen.

characterized as the 49% total equity requirement.¹⁷ In particular, the IG notes that non-citizens may have owned 52% of the total equity of Airways at least for some period of time before the company was reorganized. While the 49% may have been exceeded for a time following the death of one of the U.S. Citizen founders of Airways, it certainly is not the case now, and has not been the case since the reorganization was completed.

In any event the 49% threshold is not a specific limit on foreign investment but only a "safe harbor." When the 49% threshold was exceeded, the Department was advised of that fact and the steps that Airways was taking to bring itself into compliance with the Department's policy regarding total equity. The Department reviewed the issue and determined that there were no control implications. Airways dutifully followed the road map discussed with the Department to remove any question regarding its equity structure, and now, it is beyond dispute that, having followed that roadmap, that Airways' equity structure is entirely unobjectionable. The IG does not dispute the legality of Airways' current equity structure. That, we respectfully submit, is, and should be, the end of the matter.

¹⁷ The 49% safe harbor standard was established in Order 91-1-41, *In this Matter of the Acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc.*, dated January 23, 1991, granting in part a petition by Northwest Airlines to relax an ad hoc requirement the DOT had imposed on KLM and other foreign equity holders to reduce their holdings in Northwest equity from 68% to the then extant standard of 25%. In the original order approving the Wings acquisition of Northwest, the DOT had given KLM and other foreign equity holders six months to do this, with the possibility of an additional six months if necessary to meet good faith efforts. *Id.* at 3.

In partly granting Northwest's petition, the DOT allowed total foreign equity holdings in Northwest to be as large as 49% of Northwest's total equity. In addition, however, since KLM and other foreign holders held a total of 68% (56.74% held by KLM itself), the DOT articulated a "flexible" approach to treating the equity holdings in excess of 49%, including placing the excess stock holdings in a voting trust. *Id.* at 10, which is exactly what the foreign holders of Northwest stock did.

Throughout its restructuring, Airways consistently disclosed all relevant information in a timely manner in compliance with Part 204 of the Department's regulations. Airways' scrupulous disclosure ensured that the Department was made aware of all relevant corporate changes. The Department reviewed that information, conducted a thorough investigation, including interviewing Airways' directors and officers, and concluded that Airways continues to be under the actual control of its U.S. citizen shareholder. And there is no dispute that 55% of the total equity in Airways, as reorganized, and 75% of the voting equity is owned by William A. Robinson, a U.S. citizen.

b. Significant Contracts. The IG references only one "significant contract," the ACMI agreement between Airways and DHL Holdings (USA) ("Holdings"), under which Airways provides capacity for the DHL network, as a subject meriting further review. The IG recommends that the Department review the agreement to determine what legal significance, if any, it has on the question of actual control. The Department, however, already has completed an exhaustive review of that issue and found nothing in the ACMI agreement (negotiated at arms length by the parties) to undermine its conclusion that Airways continues to be a U.S. citizen, in compliance with the actual control requirement. Indeed, a long-term ACMI agreement, rather than raising questions about Airways independence, actually serves to ensure that the foreign owned entity has no control. Simply stated, unless Airways fails to meet certain highly achievable operational performance standards, the ground company is contractually obligated to make payments due under the contract, hardly a means for controlling Airways.

While the IG essentially restates the allegations of UPS and Federal Express that Airways, through the ACMI agreement, has ceded actual control to foreign persons, the Department recognized that the ACMI agreement is a standard form of airline industry contract and has no such alleged adverse effect. The requirement that the lessee pay for a wide range of the lessor's operating costs (a routine ACMI provision) does not mean that the lessee has actual control over the lessor but merely reflects standard industry practice.

Also the IG notes that the Department, as part of its continuing fitness review, recommended that Airways hire a marketing executive to help it develop its third-party business -- a recommendation that, as the IG acknowledges, Airways adopted, further underscoring the effectiveness of the Department's informal procedures.¹⁸ The IG states that, to the best of his knowledge, Airways "has not materially increased third-party revenues."¹⁹ That statement appears to indicate that the IG based his report on less-than-current information.

In fact, despite highly adverse operating conditions since September 11, 2001, Airways has had important success in developing its third-party business. For example, Airways has won contracts from the U.S. military to transport cargo between Europe and the Middle East -- a critical strategic transportation function for the U.S. military. For example, from January 2002 through February 2003 Airways performed 318 missions in support of U.S. military activities in Europe and

¹⁸ See Mineta letter, at 2 ("[t]he reorganization plan itself changed during this investigation in response to DHL Airways' corporate needs and to DOT's recommendations made prior to implementation").

¹⁹ IG Letter, at 9.

the Middle East. Indeed, (as the IG fails to note) Airways not only hired a senior executive to lead its third-party business development drive, but also acquired aircraft dedicated for that specific purpose.

The most important policy consideration underpinning the citizenship requirement for US certificated carriers is to give the US Department of Defense access to emergency lift through the CRAF program. Airways has been, and remains a faithful participant in CRAF, and it has played a significant role in advancing US national security and military objectives as our nation approaches military conflict with Iraq. We have conducted our commercial activities in full accord with our responsibilities as US citizens. If our opponents were to have their way, this lift no longer would be available to the military.

As the Department is aware, Lynden Air Cargo has moved to join the UPS/Federal Express complaints against Airways. Lynden's intervention constitutes telling evidence of Airways' success in developing third-party business, because Lynden's complaint -- that it lost out to Airways in bidding for a military contract -- specifically contradicts the assertions that Airways has not developed third-party business. Ironically, Lynden is seeking to exploit this proceeding to undermine Airways' credentials and qualification to bid for such contracts, *i.e.*, to develop third party business and to assist the military and nation in times of military necessity.

Airways will continue to work to further develop its third-party business in the future. Moreover, there is no reason why DHL Holdings (USA) would want to frustrate those efforts, since it profits from such contracts through its 45% equity

interest in Airways; while the IG notes that Airways splits some of the profits from third-party business with Holdings, this is only true because Holdings is a shareholder. In reality all profits (and losses) inure to the benefit of Airways' shareholders for retention or distribution as the Board may determine. The ACMI was structured to afford Airways an array of opportunities and incentives to develop third party business: Airways may use equipment dedicated to the network for its own use without consent or compensation to the network, when the equipment is not required to provide network services.

c. Credit Agreement/Debt. The IG points out that DHL International has guaranteed Holdings' payments to Airways under the ACMI agreement in certain circumstances and that such guarantee has facilitated Airways' ability to obtain independent commercial financing, including a line of credit. The IG recommends that the Department "determine the facts and circumstances surrounding these guarantees and whether, as applied to the indicia of control factors, they carry any legal significance."²⁰ The Department, however, already has investigated that issue thoroughly as part of its continuing fitness review and found nothing in the credit support documents that raises questions about the actual control of Airways by a U.S. citizen. There is nothing sinister about a more creditworthy parent providing credit support for the contractual obligations of a subsidiary, and such support provides no basis for any foreign person to exercise control over Airways. To the contrary, the commercial credit

²⁰ *Id.* at 9.

support indirectly promotes Airways' independence because, by assuring that Airways will receive payments to which it is entitled under the ACMI agreement, it enhances Airways' ability to obtain independent financing. The IG does not explain how such an arrangement could be inimical to actual U.S. control, which, of course, it is not.

d. Family Relationships/Business Relationships. As noted above, the IG recognizes that Airways meets the citizenship requirements of the statute. William Robinson owns 75 percent of Airways' voting stock and 55 percent of its total equity.²¹ As Airways' majority owner, Mr. Robinson has the right to appoint three of the four members of Airways' board and has done so, thereby further underscoring his actual control of Airways. The IG does not question any of this on its face; in fact, the IG acknowledges that Airways provided the Department with documents relevant to that investigation²² and the result was the Department's conclusion that Airways continues to be a U.S. citizen under Mr. Robinson's actual control. Instead, the IG has recommended that the Department investigate to determine whether there are any other "agreements . . . implicit or explicit, oral or written, obligations . . . that bear on the question of actual control."²³ Again, however, the Department has investigated these questions

²¹ As Airways previously has disclosed, Mr. Robinson is an independent investor who, although "among the founders of DHL, . . . is not now an officer, director, or employee of [DHL] Holdings, any of the other companies around the world that operate under the DHL brand name, or Deutsche Post." See *Consolidated Answer of DHL Airways*, Sept. 6, 2002, at 6 & n.6 (Docket OST-02-13089).

²² IG Letter, at 10 ("[t]he stock purchase agreements were reduced to writing and reviewed by the Department during the course of its informal review").

²³ *Id.* at 10. The IG also notes that Mr. Robinson owned 4.753% of the equity of DHL International, which subsequently was acquired by Deutsche Post. That interest was disclosed to the Department, which concluded that it

comprehensively and conclusively, and the answer to the IG's question is that there were no such agreements or understandings. It is important to emphasize the rigor of the Department's investigation in this regard. The Department did not merely review the stock purchase agreements; it also interviewed Airways' directors and officers in person and, during those interviews, had an opportunity to explore the questions the IG raises.²⁴ The Department's finding was that there were no agreements, formal or informal, that would have caused the Department to withhold its determination that Airways continued to be a citizen. Once again, the Department's informal procedures worked as they should have: the Department asked the hard questions, and Airways responded, including disclosing confidential, business-sensitive information.

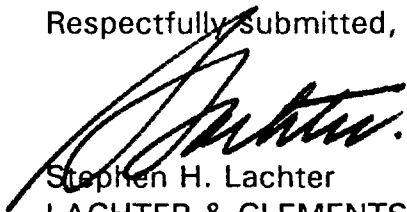
CONCLUSION

In his letter, the IG raised questions about Airways' citizenship based on four "factors bearing on actual control" that allegedly are in dispute, and recommended that the Department investigate. The IG fails to recognize, however, that the Department already has investigated those questions and found nothing to undermine its conclusion that Airways continues to be a U.S. citizen, fit to hold a certificate of public convenience and necessity. Indeed, the IG specifically recognized that the decision on these issues is the Department's alone. The only dispute is premised on the false and unsubstantiated allegations raised by Airways'

did not undermine the conclusion that Airways continued to be a citizen. Mr. Robinson, of course, disposed of all his holdings in DHL International at the time he acquired his shares in Airways.

competitors, which have challenged the Department's determination that Airways continues to be a U.S. citizen and demanded access to Airways' confidential information to which they are not entitled. The fact that Airways' competitors do not like the outcome of the Department's fitness review does not diminish the integrity or factual basis of the Department's determination. Airways has urged the Department to issue a written decision explaining the basis for its determination that Airways continues to be a U.S. citizen. The IG's letter further underscores the need for the Department to issue such a decision. We urge it to do so and to conclude this proceeding on that basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Lachter", is written over the typed name.

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March 19, 2003

²⁴ See Mineta letter, at 1 ("Department officials met with DHL Airways officers and counsel on numerous occasions and received documents containing confidential information concerning the corporate change and the company's relationship to DHL Worldwide Express . . . and DHL International.").

CERTIFICATE OF SERVICE

I hereby certify that I have served by 1st class mail, copies of the foregoing Comments of DHL Airways, Inc., this 19th day of March, 2003 to all persons named on the Service List.



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